NO. 48742-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHANE JACKMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

A. ISSUES IN REPLY

1. Does State v. Ague-Masters,[1] a case involving remarkably different facts, support the State's argument that no search occurred?

2. Does State v. Daugherty[2] remain good law for the proposition for which Jackman has cited it?

B. ARGUMENT IN REPLY

1. *AGUE-MASTERS* DOES NOT SAVE THE ILLEGAL SEARCH IN THIS CASE.

The State argues that Ague-Masters, 138 Wn. App. 86, is directly on point and, moreover, this Court should affirm because a ruling denying suppression was affirmed in that case. Brief of Respondent (BOR) at 6-8. The State is mistaken.

Putting aside the legal analysis employed in that case, the State's claim of factual similarity does not withstand scrutiny. In Ague-Masters, this Court rejected an argument that deputies looking for another man (for whom they had a warrant) on Ague-Masters' property exceeded the scope of implied invitation by driving through an open gate, knocking on the front door, and then walking through an open area after hearing a noise from the

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[1] State v. Ague-Masters, 138 Wn. App. 86, 156 P.3d 265 (2007).

[2] State v. Daugherty, 94 Wn.2d 263, 616 P.2d 649 (1980), overruled on other grounds by State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

back yard. 138 Wn. App. at 98. This Court summarized the facts as follows:

> deputies entered the property during daylight hours and drove through an open, unlocked gate, proceeding down an unobstructed driveway. Although [one of the deputies] saw what could have been a "No trespassing" sign, two other officers did not see it. One deputy knocked on the front door but no one answered and, after hearing a noise, the deputies followed the noise through an open yard to where they found [a man matching the description of the man they were seeking].

Id. at 99.

After seizing that man, who turned out not to be the man who had the warrant, deputies nonetheless discovered evidence that led them to obtain a search warrant for the residence. Id. at 93-96. Police subsequently discovered evidence in the residence and outbuildings, which led to various criminal charges. Id. at 95.

Ague-Masters moved to suppress this evidence, and the trial court denied the motion. Id. at 95-96. On appeal, this Court upheld the trial court's decision on the grounds that a "reasonable, respectful citizen would believe that he could drive through the open gate and down the driveway to the area where the deputies stopped, despite the possible presence of the [no trespassing] sign in the tree." Id. at 99. This Court concluded, moreover, that a "reasonable, respectful citizen seeking to contact an occupant would believe he could follow the . . . unobstructed path to the

backyard. Id. Therefore, this Court concluded, deputies did not exceed the scope of implied invitation on the property. Id.

Here, the situation was far different. Approaching a residence after dark, police officers, ostensibly present to contact an occupant, bypassed what Deputy Newman described as the "front door" of the accessory dwelling unit's living quarters,[3] which was lit up. RP 9, 19-20, 27, 90. Continuing—for some reason—along the driveway on foot, they ran the license plate of a car that was a different color than that car reported stolen, saw another car without a license plate, veered off the obvious path of travel, moved along the length of that car to its front, and then peered into the windshield to view its vehicle identification number—all under a looming no-trespassing sign. RP 9-11, 18, 33-34, 42; CP 138; see also Brief of Appellant (BOA) at 18, 21 (summarizing facts in light of applicable legal standard).[4] A deputy then contacted Jackman at the same

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[3] RP 19-20, 27, 89-90.

[4] Notably, the State's summary of the deputies' actions, set forth at page 9 of the Brief of Respondent, distorts and misstates the facts. First, the State fails to note that the deputies, who were traveling by foot, had to pass the only door where they saw lights on, and which one deputy carefully characterized as a front door, to arrive at the cars. Second, the State asserts the deputies discovered the car that was "similar" to the car reported stolen was, in fact, stolen. BOR at 9. Instead, the deputies verified that that car had *not* been reported stolen. RP 9, 17, 33-34. Instead, the deputies had to engage in additional exploration to locate a stolen car. RP 11, 34, 42.

door the deputies had previously walked past. RP 34. In Ague-Masters, the State could plausibly argue that the deputies' actions fell within the scope of conduct a respectful citizen would engage in if hoping to make contact with an occupant of the property. Based on the facts summarized above, which accurately reflect the suppression hearing testimony and the court's findings, the State cannot plausibly make such an argument in this case.

For the reasons explained in Jackman's opening brief, the police offices' actions constituted an illegal search.

2. *DAUGHERTY* REMAINS GOOD LAW FOR THE PROPOSITION FOR WHICH JACKMAN RELIES ON IT.

The State also asserts that Daugherty, 94 Wn.2d 263, a case which is factually similar to this case, is no longer good law. Indeed, a portion of the decision was overruled by Hill, 123 Wn.2d 641.[5] See BOR at 11-12.

As the State appears to acknowledge, however, the Daugherty court recited the disapproved-of language only in the context of determining whether, as the trial court had found, an exception to the warrant requirement applied. Id. at 269-71.

[5] Jackman's opening brief correctly indicates that Daugherty was "overruled on other grounds" by Hill. BOA at 11 n. 4.

The proposition for which Jackman relies on Daugherty—that the officers' deviation from the path of travel to a residence crossed the line from "plain view" to warrantless search—survives Hill. Daugherty, 94 Wn.2d at 267-69. There is no hint that the Supreme Court engaged in any improper evaluation of the underlying facts as to this portion of its decision. Daugherty is on point and remains good law for the proposition for which Jackman has relied on it. Daugherty, as well as the other cases relied on in Jackman's opening brief, requires reversal in this case.

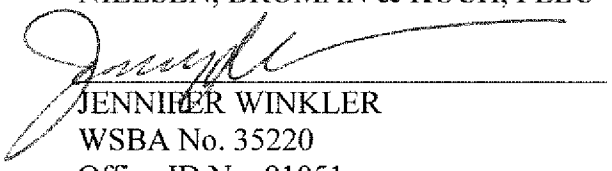
C. CONCLUSION

For the reasons set forth above and in Jackman's opening brief, this Court should reverse Jackman's convictions and order dismissal of the charges based on the illegal warrantless search.

DATED this 22nd day of February, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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